



EU, COMPETITION AND REGULATED MARKETS

The General Court to Re-examine Intel's €1.06 Billion Antitrust Fine

by **Marco Hickey**

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A judgment imposing a €1.06 billion fine on Intel for abuse of a dominant position has been set aside by the Court of Justice of the European Union (CJEU).

On 6 September 2017, the CJEU set aside the judgment of the General Court that upheld the €1.06 billion fine imposed on Intel by the European Commission for abuse of a dominant position. The CJEU has referred the case back to the General Court so that it may examine the arguments put forward by Intel in relation to whether the rebates at issue are capable of restricting competition.

Abuse of Dominance

On 13 May 2009, the Commission imposed a fine of €1.06 billion on Intel, the US-based microchip manufacturer, for having abused its dominant position in the market for x86 central processing units (CPUs), in infringement of EU competition law. The Commission ordered Intel to bring an immediate end to that infringement in so far as it had not done so already.

According to the Commission, Intel abused its dominant position on the worldwide market for x86 CPUs from October 2002 to December 2007, by implementing a strategy aimed at foreclosing a competitor, Advanced Micro Devices Inc. (AMD), from the market. The Commission considered that Intel was in a dominant position on the basis that it held a market share of roughly 70% or more, and that it was extremely difficult for competitors to enter the market and to expand as a result of the unrecoverable nature of investments to be made in research and development, intellectual property and production facilities.

In the view of the Commission, the abuse was characterised by several measures adopted by Intel in relation to its own customers, who were computer manufacturers, and a European retailer of microelectronic devices, Media-Saturn-Holding. Intel granted rebates to four major computer manufacturers (Dell, Lenovo, HP and NEC) on the condition that they purchased all, or almost all, of their x86 CPUs from Intel. Similarly, Intel awarded payments to Media-Saturn, which were conditional upon Media-Saturn only selling computers containing Intel's x86 CPUs. The Commission argued that those rebates and payments induced the loyalty of the four aforementioned manufacturers and of Media-Saturn, and thus significantly diminished the ability of Intel's competitors to compete on the merits of their x86 CPUs. Intel's anti-competitive conduct thereby resulted in a reduction of consumer choice and in lower incentives to innovate.

The General Court

Intel challenged the Commission's decision before the General Court, seeking the annulment of that decision or, at

least, a substantial reduction of the fine. On 12 June 2014, the General Court dismissed Intel's action in its entirety. Following this dismissal, Intel brought an appeal before the CJEU. According to Intel, the General Court erred in law by failing to examine the rebates at issue in the light of all the circumstances of the case.

The CJEU Judgment

As regards that complaint, the CJEU noted that the General Court confirmed the Commission's line of argument that loyalty rebates granted by an undertaking in a dominant position were, by their very nature, capable of restricting competition such that an analysis of all the circumstances of the case and, in particular, an as efficient competitor test (AEC test) were not necessary.

The CJEU observed that, while the Commission emphasised that the rebates at issue were by their very nature capable of restricting competition, it nevertheless carried out an in-depth examination of the circumstances of the case in its decision. That examination led the Commission to conclude that an as efficient competitor would have had to offer prices which would not have been viable, and that accordingly, the rebate scheme at issue was capable of foreclosing such a competitor. The AEC test therefore played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors.

Hence, the CJEU held that the General Court was required to examine all of Intel's arguments concerning that test, such as, the errors allegedly committed by the Commission as regards that test, which the General Court failed to do.

"The Court therefore sets aside the judgment of the General Court as a result of that failure in its analysis of whether the rebates at issue were capable of restricting competition," the CJEU asserted. "The Court refers the case back to the General Court so that it may examine, in the light of the arguments put forward by Intel, whether the rebates at issue are capable of restricting competition."

In relation to the Intel ruling, the company's General Counsel, Steven R. Rodgers, said: "We welcome today's landmark ruling. While this case concerns events that happened more than a decade ago, we have always believed that our actions were lawful and did not harm competition. We look forward to the next step in this process."

While competition regulators have generally frowned upon rebates offered by dominant players, on the theory that they are anti-competitive in nature, the CJEU ruling could indicate a move towards a more effects-based analysis. This could prompt a rethink or a reformulation of rebate provisions in relation to abuse of dominance.

The European Commission gave a cautious response when asked what the latest ruling would mean for other technology companies under investigation in Europe, and whether it would give those firms confidence to pursue legal challenges rather than to reach financial settlements.

"I cannot comment how companies will proceed or assess the judgment," Ricardo Cardoso, a spokesman for the Commission, said at a news conference. "We ourselves still have to look carefully into the details of the judgment."

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